

FCC MAIL SECTION

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Federal Communications Commission

DA 97-1115

DISPATCHED

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 95-49
Table of Allotments,	)	RM-8558
FM Broadcast Stations.	)	
(Llano and Marble Falls, Texas)	)	

REPORT AND ORDER  
(Proceeding Terminated)

Adopted: May 14, 1997

Released: May 30, 1997

By the Chief, Allocations Branch:

1. The Commission has before it the Notice of Proposed Rule Making, 10 FCC Rcd 4913 (1995), and the Further Notice of Proposed Rule Making, 11 FCC Rcd 12647 (1996), in this proceeding. Maxagrid Broadcasting Corporation ("Maxagrid") and Kirkman Group, Inc. ("Kirkman Group") filed comments. Maxagrid filed reply comments. Roy E. Henderson ("Henderson") filed a counterproposal. In response to the Further Notice, Maxagrid again filed comments and reply comments. Henderson filed comments, and a Motion to Withdraw Counterproposal. Along with Tichenor License Corporation ("Tichenor"), Henderson also filed a new counterproposal, and reply comments. For the reasons discussed below, we are substituting Channel 285C3 for Channel 284C3 at Llano, Texas, reallocting Channel 285C3 to Marble Falls, Texas, and are modifying the license of Station KBAE to specify operation on Channel 285C3 at Marble Falls. In addition, we are allotting Channel 242A to Llano, Texas. In a related context, we are dismissing counterproposals filed by Henderson proposing a Channel 285A reallocation to Katy, Texas, and a 285C3 reallocation to Missouri City, Texas, as well as a counterproposal filed by Tichenor for a Channel 242C2 reallocation to Menard, Texas.

Background

2. At the request of Maxagrid, licensee of Station KBAE, Channel 284C3, Llano, Texas, the Notice proposed the substitution of Channel 285C3 for Channel 284C3 at Llano, reallocation of Channel 285C3 to Marble Falls, Texas, and modification of the Station KBAE license to specify operation on Channel 285C3 at Marble Falls.<sup>1</sup> In response to the Notice, Henderson, licensee of Station KLTO, Channel 285A, Rosenberg, Texas, filed a counterproposal proposing

<sup>1</sup>In a related matter, Maxagrid submitted a letter to the International Bureau regarding the required notification to the Mexican government concerning its proposed reallocation to Marble Falls. Inasmuch as a copy of this letter was served on all parties in this proceeding and did not go to the merits of this restricted proceeding, further inquiry as to a possible ex parte communication is unwarranted.

the reallocation of Channel 285A to Katy, Texas, and modification of his Station KLTO license to specify operation at Katy. In its comments, Maxagrid acknowledged that its reallocation proposal would remove the sole local service from Llano. To address this concern, Maxagrid proposed a Channel 242A allotment at Llano and stated its intention to apply for this channel and construct the facility.<sup>2</sup> The Further Notice proposed the allotment of Channel 242A to Llano. In response to the Further Notice, Henderson filed a Motion to Withdraw Counterproposal and a second counterproposal.<sup>3</sup> Along with Tichenor, licensee of Station KLTP, Channel 285A, Galveston, Texas, Henderson now proposes the substitution of Channel 285C3 for Channel 285A at Rosenberg, the reallocation of Channel 285C3 to Missouri City, Texas, and modification of his Station KLTO license to specify operation on Channel 285C3 at Missouri City. To accommodate the Henderson proposal for Channel 285C3 at Missouri City, Tichenor proposes the substitution of Channel 242C2 for Channel 285A at Galveston, reallocation of Channel 242C2 from Galveston to Menard, Texas, and modification of its Station KLTP license to specify operation on Channel 242C2 at Menard.

3. The underlying reallocation proposal for Channel 285C3 at Marble Falls, as well as the subsequent counterproposals proposing the reallocation of Channel 285C3 to Missouri City and Channel 242C2 to Menard are all filed pursuant to Section 1.420(i) of the Commission's Rules. Section 1.420(i) permits the modification of a station authorization to specify a new community of license without affording other interested parties an opportunity to file a competing expression of interest. See Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License"), 4 FCC Rcd 4870 (1989); recon. granted in part, 5 FCC Rcd 7094 (1990). In considering a reallocation proposal, we compare the existing allotment versus the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based upon the FM allotment priorities set forth in Revision of FM Assignment Policies and Procedures ("FM Priorities"), 90 FCC 2d 88 (1982).<sup>4</sup> In making the evaluation, we consider the "totality of factors." LaGrange and Rollingwood, Texas, 10 FCC Rcd 3337 (1995).

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<sup>2</sup>At the time of the Notice, Maxagrid had suggested that a Channel 242A allotment could be allotted Llano as a replacement service. Inasmuch as Maxagrid did not state its intention to apply for a Channel 242A allotment at Llano, this proposal was not included in the original Notice.

<sup>3</sup> The original counterproposal filed by Henderson required Station KBUK, Channel 285A, LaGrange, Texas, to reallocate its channel to Smithville, Texas, and relocate its transmitter site. Because Fayette Broadcasting Corporation, licensee of Station KBUK, has not consented to the proposed reallocation and transmitter relocation, the Henderson counterproposal was not acceptable and would not have been considered. See Claremore, Oklahoma, 3 FCC Rcd 4037 (1988); Lopez and Dushore, Pennsylvania, 7 FCC Rcd 854 (1992). Subsequently, Henderson filed, on September 23, 1996, a Motion to Withdraw his counterproposal. A Declaration of No Consideration was submitted indicating that no consideration was received in exchange for his withdrawal pursuant to Section 1.420(j) of the Commission's Rules.

<sup>4</sup>The FM allotment priorities are as follows: 1) First full-time aural service; 2) Second full-time aural service; 3) First local service; and 4) Other public interest matters. Co-equal weight is given to priorities (2) and (3).

Rosenberg, Missouri City, Galveston and Menard, Texas

4. We are dismissing both the proposal by Henderson for a Channel 285C3 reallocation to Missouri City, and the proposal by Tichenor for a Channel 242C2 reallocation to Menard, Texas. Section 1.420(i) specifically requires that the allotment at the new community be mutually exclusive with the existing authorization. In this situation, a Channel 242C2 allotment at Menard is not mutually exclusive with the Tichenor Station KLTP license on Channel 285A at Galveston. As such, this proposal cannot be considered in the context of Section 1.420(i) of the Rules. In this vein, a Channel 242C2 proposal is mutually exclusive with the Channel 242A allotment proposed in the Further Notice. The Channel 242C2 proposal at Menard could have been considered in this proceeding as a counterproposal for a new allotment. However, Tichenor specifically stated in its counterproposal that it commits to applying for and constructing the Channel 242C2 facilities at Menard "upon adoption of this entire counterproposal and the deletion of Channel 285A from Galveston and the reallocation of that facility to KLTP as Channel 242C2 in Menard." We do not construe this statement as a commitment to apply for a Channel 242C2 as a new allotment for Menard subject to competing applications filed during a filing window. In the absence of such a commitment, we will not allot Channel 242C2 to Menard.

5. We are dismissing the Henderson counterproposal for a Channel 285C3 allotment at Missouri City because it is untimely. The Further Notice invited comments and counterproposals with regard to the proposed Channel 242A allotment at Llano. In this connection, the Further Notice specifically stated that we would not accept counterproposals regarding the reallocation of Channel 285C3 from Llano to Marble Falls. To be considered as a timely counterproposal in this proceeding, Henderson should have filed his Channel 285C3 counterproposal for Missouri City by the June 22, 1995, comment date set forth in the original Notice. Henderson did not file his counterproposal until September 23, 1996.

Llano and Marble Falls, Texas

6. The reallocation of Channel 285C3 to Marble Falls coupled with the Channel 242A allotment to Llano is a preferential arrangement of allotments as required by Community of License.<sup>5</sup> We will discuss the public interest benefits of both actions. In doing so, it is first necessary to evaluate the reallocation to Marble Falls versus retaining the allotment at Llano. Both allotments are entitled to consideration as a first local service under priority (3) of FM Priorities. We are granting the proposed reallocation from Llano to Marble Falls, Texas. There are three reasons for this action. First, after comparing Llano and Marble Falls, the larger of the two communities would have the first local service. See Three Oaks and Bridgman, Michigan, 5 FCC Rcd 1004 (1990). The population of Marble Falls (4,007 persons) is greater than the

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<sup>5</sup> The reference coordinates for the Channel 285C3 allotment at Marble Falls, Texas, are 30-26-45 and 98-11-45. The reference coordinates for the Channel 242A allotment at Llano, Texas, are 30-49-57 and 98-40-44. Since Marble Falls and Llano are located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government has been obtained for these allotments.

population of Llano (2,962 persons). Second, this reallocation will result in a gain in service to 34,860 persons in an area of 2,761 square kilometers. In this regard, we recognize that 13,801 persons would lose service in an area of 3,295 square kilometers and this would create a gray area (an area having only one reception service) containing 35 persons in an area of 23.3 square kilometers. Third, the allotment of Channel 242A to Llano addresses this concern. At the reference coordinates, a Channel 242A allotment at Llano will reduce the gray area to 16.3 square kilometers and a population of 24. Further, a revised site (30-49-50 and 98-43-15) exists for Channel 242A at Llano which would eliminate the gray area entirely. Inasmuch as the Channel 242A allotment at Llano is the direct result of reallocating Channel 285C3 to Marble Falls, our action in this proceeding will result in both Llano and Marble Falls having first local services. In a related context, we note that a Channel 242A allotment at Llano will serve 9,735 persons in an area 2,450 square kilometers. This reduces the loss of service resulting from the reallocation of Channel 285C3 to Marble Falls. Most of the loss area is well served with at least 5 full-time reception services. We do recognize, however, that in the loss area 54 people would go from 4 to 3 reception services and 87 people would go from 5 to 4 reception services.

7. We are also concerned by any disruption in service that would be occasioned by removing the sole local service from Llano. In Community of License, 5 FCC Rcd at 7097, the Commission specifically stated that the public has a legitimate expectation that existing service will continue, and that this expectation is a factor to be weighed independently against the service benefits that may result from reallocating a channel. We did so in this proceeding. Ordinarily, allotment of a replacement channel is not sufficient to overcome the concern pertaining to a disruption of local service. To address this adverse result of its proposal, Maxagrid proposed a Channel 242A allotment at Llano. In regard to disruption of service, Maxagrid states that "assuming no one else applies for Channel 242A at Llano, Maxagrid intends to simultaneously commence program tests on Channel 285C3 at Marble Falls and on Channel 242A at Llano." The Maxagrid commitment to avoid any disruption in service is predicated on no competing applications for the Channel 242A allotment at Llano. In the event that we do receive multiple applications for a Channel 242A allotment at Llano, we note that Channels 271A, 273A and 275A are available for allotment to Llano. In view of the public interest benefits of having both a first local service in Marble Falls coupled with the new allotment in Llano, we will entertain a petition for rule making for an additional channel in Llano if a competing application is filed for this allotment. See Albion, Nebraska, 10 FCC Rcd 11927 (1995). This will avoid any significant disruption in service or delay in instituting the replacement service in Llano. Therefore, grant of Maxagrid's proposal is premised on its pledge that Maxagrid will file an application to operate Channel 242A at Llano and, if authorized, to build the facility promptly. Were it not for this pledge, we would not consider granting this proposal.<sup>6</sup> We will condition the grant of an authorization to operate Station KBAE(FM) on 285C3 at Marble Falls upon Maxagrid's activation of Channel 242A at Llano, Texas.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and

<sup>6</sup> See Albion, Lincoln, and Columbus, Nebraska, 8 FCC Rcd 2876 (1993).

(r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective July 14, 1997, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>
Llano, Texas	242A
Marble Falls, Texas	285C3

9. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Maxagrid Broadcasting Corporation for Station KBAE(FM), Llano, Texas, IS MODIFIED to specify operation on Channel 285C3 at Marble Falls, Texas, in lieu of Channel 284C3 at Llano, Texas, subject to the following conditions:

- (a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.
- (b) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.
- (c) Operation of Station KBAE(FM) on Channel 285C3 in Marble Falls, Texas, including program test operation pursuant to Section 73.1620, will not be commenced until such time as express authorization from the Commission has been granted. Such authorization will not be granted until a construction permit has been issued for Channel 242A at Llano, Texas, and activation of service has been initiated on Channel 242A at Llano.

10. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and /or upgrade. As a result of this proceeding, Maxagrid Broadcasting Corporation, licensee of Station KBAE(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

11. IT IS FURTHER ORDERED, That the counterproposal filed by Roy E. Henderson proposing the change of community of license for Station KLTO(FM), Channel 285A, from Rosenberg to Katy, Texas, and simultaneously changing the community of license for Station KBYK(FM), Channel 285A, from La Grange to Smithville, Texas, IS DISMISSED.

12. IT IS FURTHER ORDERED, That the counterproposal filed by Roy E. Henderson proposing the substitution of Channel 285C3 for Channel 285A at Rosenberg, Texas, the reallocation of Channel 285C3 from Rosenberg to Missouri City, Texas, the modification of

Station KLTO's license to specify Missouri City as the station's community of license; the substitution of Channel 242C2 for Channel 285A at Galveston, Texas, the reallocation of Channel 242C2 from Galveston to Menard, Texas, and the modification of Station KLTP(FM)'s license accordingly, IS DISMISSED.

13. The window period for filing applications for Channel 242A at Llano, Texas, will open on July 14, 1997, and close on August 14, 1997.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

**FEDERAL COMMUNICATIONS COMMISSION**

John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau